(21,987)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 761.

ONG CHANG WING AND KWONG FOK, PLAINTIFFS IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 12, 1910.

a

No. 4530.

Transcript of Record.

In the Supreme Court of the United States.

ONG CHANG WING and KWONG FOK, Plaintiffs in Error,
versus
THE UNITED STATES OF AMERICA, Defendant in Error.

In the Supreme Court of the Philippine Islands.

1 Supreme Court of the United States.

ONG CHANG WING and KWONG FOK, Plaintiffs in Error,
vs.
THE UNITED STATES OF AMERICA, Defendant in Error.

In Error to the Supreme Court of the Philippine Islands.

Proceedings Had in the Court of First Instance for the City of Manila, Philippine Islands, and the Supreme Court of the Philippine Islands.

THE UNITED STATES
versus
ONG CHANG WING and KWONG FOK.

Be it remembered that heretofore, to-wit, on the 20th of September, A. D. 1907, in the Court of First Instance for the City of Manila, P. I., came C. L. Bouvé, Assistant Prosecuting Attorney for the said City, and filed in the said court a separate information, subscribed and sworn to by him, against each of the said Ong Chang Wing and Kwong Fok, which said informations are in the words and figures following, to-wit:

UNITED STATES OF AMERICA,
Philippine Islands:

In the Court of First Instance for the City of Manila.

2 THE UNITED STATES, Plaintiff,
vs.
ONG CHANG WING, Defendant.

Information, Gambling.

Pursuant to an investigation heretofore had in the Office of the Prosecuting Attorney of the City of Manila under the provisions of section 39 of act 183 of the United States Philippine Commission,

the undersigned, Assistant Prosecuting Attorney, of the City of Manila, Philippine Islands, gives the Court information against Ong Chang Wing, and accuses the said Ong Chang Wing of the crime of gambling and being a proprietor of a house where games of chance, stakes or hazard are played, committed under the following circumstances:

That on or before the 15th day of September, 1907, in the City of Manila, Philippine Islands, the accused Ong Chang was then and there wilfully, unlawfully and feloniously a proprietor of house No. 10 Ugalde, then and there a house in which gambling and games of chance, stakes and hazard were carried on and were accustomed to be carried on, to wit: That on or about the date aforesaid, while the accused was then and there proprietor of the house aforesaid, there did then and there wilfully, unlawfully and feloniously come to and assemble at the said house No. 10 Ugalde, with the full consent and knowledge of the accused, the said Ong Chang Wing, many Chinese persons whose names are unknown, who were then and there accustomed to assemble at the said house on or about
3 the date aforesaid, and many times prior thereto, and who did thus assemble with unlawful purpose of playing games of chance, stakes and hazard, and did then and there with the connivance, knowledge, assistance and cooperation of the said accused, Ong Chang Wing, assemble and gather at the said house No. 10 Ugalde of which the accused was then and there proprietor, and did then and there wilfully, unlawfully and feloniously and with the full knowledge, assistance, connivance and co-operation of the accused indulge in and take part in a game of chance, stakes or hazard known as the game of Fan-Tan, which is a game in which the stakes which are played for consist of money, and in which success or failure to win on the part of the persons therein participating is dependent entirely on chance and hazard and not on skill, address or good judgment on the part of the said players.

All contrary to law.

(Signed) C. L. BOUVÉ,
Assistant Prosecuting Attorney.

Subscribed and sworn to before me this 20 day of September, 1907, in the City of Manila, Philippine Islands, by

(Signed) NEWTON W. GILBERT,
Judge, Court of First Instance.

UNITED STATES OF AMERICA,
Philippine Islands, City of Manila, ss:

The undersigned, C. L. Bouvé, deposes and says that he is Assistant Prosecuting Attorney for the City of Manila, Philippine Islands, duly qualified and acting as such; that a preliminary investigation has been conducted by him in the matter of the offense set out and charged in the foregoing information; that wit-
4 nesses were called and examined under oath by him in accordance with the provisions of section 39 of Act 183 of the Philippine Commission and amendments thereto; that the names of

the witnesses against the accused so far as known at present to the undersigned are set forth in the list appearing below.

(Signed) C. L. BOUVÉ.

Subscribed and sworn to before me this 20 day of September, 1907, in the City of Manila, Philippine Islands, by C. L. Bouvé.

(Signed) NEWTON W. GILBERT.

Capt. Scott	Meisic	Police	Station.
Sarg. Lawler	"	"	"
Patrolman Sprague	"	"	"
" Brown	"	"	"
" Sacris	"	"	"
Chiong Yee	"	"	"
Ching Sing	"	"	"

UNITED STATES OF AMERICA,
Philippine Islands:

In the Court of First Instance for the City of Manila.

THE UNITED STATES, Plaintiff,
v.
KWONG FOK, Defendant.

Information, Gambling.

Pursuant to an investigation heretofore had in the Office of the Prosecuting Attorney of the City of Manila under the provisions of section 39 of Act 183 of the United States Philippine Commission, the undersigned, Assistant Prosecuting Attorney of the City of Manila, Philippine Islands, gives the Court Information against Kwong Fok, and accuses the said Kwong Fok of the crime of gambling and acting as banker in a house where games of chance, stakes or hazard are played, committed under the following circumstances:

That on or about the 15th day of September, 1907, in the City of Manila, Philippine Islands, the accused Kwong Fok, did then and there wilfully, unlawfully and feloniously act as banker in a game of chance, stakes and hazard known as fan tan in house No. 10 Ugalde, then and there a house in which gambling and games of chance, stakes and hazard were carried on and were accustomed to be carried on, to wit, that on or about the date aforesaid, while the accused was then and there acting as banker in the house aforesaid, there did then and there wilfully, unlawfully and feloniously come to and assemble at the said house number 10 Ugalde, with the full consent and knowledge of the accused, the said Kwong Fok, many Chinese persons whose names are unknown, who were then and there accustomed to assemble at the said house on or about the date aforesaid, and many times prior thereto, and who did thus assemble with unlawful purpose of playing games of chance, stakes and hazard, and did then and there with the connivance, knowledge, assistance and

coöperation of the said accused, Kwong Fok, assemble and gather at the said house No. 10 Ugalde in which the said accused did then and there act as banker in a game of chance, stakes and
6 hazard known as Fan-Tan, and did then and there wilfully, unlawfully and feloniously and with the full knowledge, assistance, connivance and coöperation of the accused as banker in a game of chance, stakes and hazard known as Fan Tan, indulge in and take part in a game of chance, stakes or hazard known as the game of Fan Tan, which is a game in which the stakes which are played for consist of money, and in which success or failure to win on the part of the persons therein participating is dependent entirely on chance and hazard and not on skill, address or good judgment on the part of the said players.

All contrary to law.

(Signed) C. L. BOUVÉ,
Assistant Prosecuting Attorney.

Subscribed and sworn to before me this 20 day of September, 1907, in the City of Manila, Philippine Islands, by C. L. Bouvé.

(Signed) NEWTON W. GILBERT,
Judge Court of First Instance.

UNITED STATES OF AMERICA,
Philippine Islands, City of Manila, ss:

The undersigned, C. L. Bouvé, deposes and says that he is Assistant Prosecuting Attorney for the City of Manila, Philippine Islands, duly qualified and acting as such; that a preliminary investigation has been conducted by him in the matter of the offense set out and charged in the foregoing information; that witnesses were called and examined under oath by him in accordance with the provisions of section 39 of Act 183 of the Philippine
7 Commission and amendments thereto; that the names of the witnesses against the accused so far as known at present to the undersigned are set forth in the list appearing below.

(Signed) C. L. BOUVÉ.

Subscribed and sworn to before me this 20 day of September, 1907, in the City of Manila, Philippine Islands, by C. L. Bouvé.

(Signed) NEWTON W. GILBERT.

Capt. Scott	Meisic	Police	Station.
Sarg. Lawler	"	"	"
Patrolman Sprague	"	"	"
Patrolman Brown	"	"	"
Patrolman Sacris	"	"	"
Chiong Yee	"	"	"
Ching Sing	"	"	"

Afterwards, to-wit, on the 22nd of September, 1907, defendants were duly arrested, and gave bail for their appearance in the sum of one hundred dollars, Philippine currency, each.

Afterwards, to-wit, on the 27th of September, 1907, defendants were duly arraigned before the said Court of First Instance for the City of Manila, and pleaded "Not guilty."

Afterwards, to-wit, on the 2nd day of October, 1907, the said Court of First Instance, by agreement between and at the request of counsel, made an order directing that the two cases be consolidated and tried together.

Afterwards, to-wit, on the 2nd day of October, 1907, the said defendants, Ong Chang Wing and Kwong Fok, were jointly
8 tried before the Honorable Newton W. Gilbert, sitting as Judge of the said Court of First Instance.

Afterwards, to-wit, on the 4th day of October, 1907, the following decision was rendered by said Judge:

UNITED STATES OF AMERICA,
Philippine Islands:

In the Court of First Instance of Manila, Part I.

#3378.

THE UNITED STATES
vs.
ONG CHANG WING.

#3379.

THE UNITED STATES
vs.
KWONG FOK.

Gambling.

Decision.

The two above entitled cases were, at the request of counsel, accumulated and tried together.

It was proven at the trial that the defendant Ong Chang Wing was the owner of a gambling house where the game of chance called "Fan-Tan" was played, the premises being known as No. 10 Calle Ugalde in the city of Manila; that on the 15th of September, 1907, and at various times prior thereto, several unknown Chinese gathered at the said premises and engaged in gambling; and that the other defendant, Kwong Fok, acted on all occasions as banker in the said game.

In order to punish the crime of gambling in accordance
9 with section 343 of the Penal Code, which provides a penalty of imprisonment and fine, it must appear that the house

where the gambling took place was a house devoted to encouraging gambling, as held in various decisions of the Supreme Court of these Islands and of the Supreme Court of Spain which are applicable to the case at bar, such requisite having been fully established in this case. Furthermore, there is no doubt, and the Court so finds, that the defendants profited by this game, which, according to the evidence, may be classed with those technically known as games of chance.

No qualifying circumstance having been proven, the penalty should be imposed in its medium degree.

Wherefore it is the judgment of this Court that each of the defendants Ong Chang Wing and Kwong Fok be sentenced to Two (2) Months and One (1) Day of Arresto Mayor with the accessories of section 61 and to pay a fine of 625 Pesetas, and in default thereof to suffer subsidiary imprisonment which shall not exceed one-third of the principal penalty, and costs: and let the sum of P591.55 be returned to defendants.

So ordered.

Manila, Oct. 4, 1907.

(Signed) NEWTON W. GILBERT, *Judge*.

Thereafter, to-wit, on the 17th of October, 1907, counsel for defendants Ong Chang Wing and Kwong Fok appealed to the Supreme Court of the Philippine Islands from the judgment of conviction of the Court of First Instance of the City of Manila, in the above entitled cause.

Thereafter, to-wit, on the 25th of January, 1908, the Clerk of the Court of First Instance of the City of Manila transmitted to the Clerk of the Supreme Court of the Philippine Islands the above entitled cause, which was duly filed and docketed in the said Supreme Court on the 27th of the same month.

Thereafter, to-wit, on the 6th day of October, 1908, the case was duly tried in the Supreme Court of the Philippine Islands.

Thereafter, to-wit, on the 15th of December, 1908, the said Supreme Court rendered its decision in the above entitled cause, which said decision is in the words and figures following, to-wit:

THE UNITED STATES OF AMERICA:

In the Supreme Court of the Philippine Islands.

No. 4530.

THE UNITED STATES, Plaintiff and Appellee,

vs.

ONG CHANG WING et al., Defendants and Appellants.

CARSON, *J.*:

The guilt of the appellants of the crime with which they were charged and convicted is fully established by the evidence of record,

and we find no error in the proceedings prejudicial to the rights of the accused.

11 Counsel for appellants contend that, since they were prosecuted under the provisions of article 343 of the Penal Code, for an offense committed on the 15th day of September, 1907, and after that date the Philippine Commission, on October 9, 1907, enacted Act No. 1757, entitled "An Act to Prohibit Gambling," repealing Articles 180, 343, and 579 of the Penal Code, the court has no jurisdiction to impose upon the appellants the penalty prescribed by the repealed article of the Penal Code. The question of the effect of the repeal of a Penal Law by a later law was discussed and decided adversely in the contention of appellants by this Court in the case of U. S. vs. El Chino Cuna alias Sy Conco (No. 4504, filed this day), and the reasoning of that case is decisive in this.

The judgment and sentence of the trial court should be and are hereby affirmed, with the costs of this instance against the appellants.

After the expiration of ten days from the notice hereof let final judgment be entered in accordance herewith, and ten days thereafter let the case be remanded to the Court of First Instance, for execution.

It is so ordered.

Arellano, C. J., Torres, Mapa, Willard and Tracey, J. J., concurring. Johnson, J. dissenting.

Thereafter, to-wit, on the 28th day of December, 1908, final judgment was entered in the said *said* Supreme Court in the above entitled cause, as follows:

12 UNITED STATES OF AMERICA:

Supreme Court of the Philippine Islands.

THE UNITED STATES, Plaintiff and Appellee,

vs.

ONG CHANG WING and KWONG FOK, Defendants and Appellants.

December 28, 1908. Decision Book VI, Page 314. File No. 4530.

This Court having regularly acquired jurisdiction to try the above entitled cause, which was submitted by both parties for decision, and after consideration by the court upon the record and proceedings, its decision and order for judgment having been filed on the 15th day of December, 1908;

By virtue of the said order, the judgment of the Court of First Instance of the City of Manila dated October 4, 1907, is hereby affirmed, with the costs of this instance against the appellants, said costs amounting to twenty-four pesos, Philippine currency, to the collection of which the trial court will proceed in the manner provided by law.

It is further ordered that the case be remanded to the Court of First Instance, for execution.

(Signed) J. E. BLANCO,
Clerk of the Supreme Court of the Philippine Islands.

Thereafter, to-wit, on the 9th day of January, 1909, counsel for defendants and appellants filed the following petition for a writ of error:

13 UNITED STATES OF AMERICA,
Philippine Islands:

In the Supreme Court of the Philippine Islands.

No. —.

UNITED STATES OF AMERICA, Plaintiff and Appellee,
vs.
ONG CHANG WING and KWONG FOK, Defendants and Appellants.

Petition for Writ of Error.

Come now the above named defendants and appellants, Ong Chang Wing and Kwong Fok, and respectfully show to the Court:

That on or about the 15th day of December, 1908, the above entitled Court rendered a judgment herein against these defendants and appellants, in which judgment and in proceedings had prior thereto in this cause certain errors were committed to the prejudice of these defendants and appellants, all of which will more in detail appear from the assignment of errors filed with this petition.

Wherefore these defendants and appellants pray that a writ of error may be issued in this behalf out of the Supreme Court of the United States for the correction of the errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, but omitting the evidence taken upon the trial of this cause in the Court of First Instance of the City of Manila, may be sent to the Supreme Court of the United States.

(Signed) FRANK B. INGERSOLL,
Attorney for Defendants and Appellants.

Which said petition is accompanied by the following Assignment of Errors:

14 UNITED STATES OF AMERICA,
Philippine Islands:

In the Supreme Court of the Philippine Islands.

No. —.

UNITED STATES OF AMERICA, Plaintiff and Appellee,
vs.
ONG CHANG WING and KWONG FOK, Defendants and Appellants.

Assignment of Error.

The defendants and appellants in this cause, in connection with their petition for a writ of error, make the following assignment of error which they aver exists:

The Supreme Court of the Philippine Islands erred in rendering a judgment depriving the defendants and appellants of their liberty without due process of law and in violation of the provisions of section 5 of the Act of Congress of July 1, 1902, known as the "Philippines Bill," in that on October 9, 1907, and prior to the submission of this cause to said Supreme Court for decision, the Philippine Commission enacted and put into effect Act No. 1757 which expressly repealed Article 343 of the Penal Code of the Philippine Islands, under which article these defendants and appellants were prosecuted and convicted.

Wherefore the said defendants and appellants (Plaintiffs in Error) pray that the judgment of the Supreme Court of the Philippine Islands be reversed and said cause against them be dismissed and that they go hence without day.

(Signed) FRANK B. INGERSOLL,
Attorney for Defendants and Appellants.

15 UNITED STATES OF AMERICA,
Philippine Islands:

In the Supreme Court of the Philippine Islands.

No. —.

THE UNITED STATES OF AMERICA, Plaintiff and Appellee,
vs.
ONG CHANG WING and KWONG FOK, Defendants and Appellants.

Supersedeas Bond.

Whereas, Ong Chang Wing and Kwong Fok, the defendants and appellants in the above entitled action, have taken a Writ of Error to the Supreme Court of the United States, for a review of the judgment rendered by the Supreme Court of the Philippine Islands, condemning the said defendants and appellants, and each of them,

to two months and one day of *arresto mayor* and to pay a fine of six hundred and twenty-five (625) *pesetas.*

Now, therefore, in consideration of the premises and of the granting by the Supreme Court of the Philippine Islands of a Writ of Error to the Supreme Court of the United States of America in favor of the said defendants and appellants,

We, Ong Chang Wing and Kwong Fok, as principals, and O. C. Hing and Chan Tat, as sureties, do hereby acknowledge ourselves to be held and firmly bound, jointly and severally, to the
16 United States of America in the sum of two thousand, five hundred pesos (P2,500), Philippine currency, to the payment whereof, well and truly to be made, we bind ourselves, our and each of our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 9th day of January, 1909.

The condition of the above obligation is such that if the said Ong Chang Wing and Kwong Fok shall prosecute said Writ of Error to effect and answer all costs if they fail to make good their plea, and if said judgment of the Supreme Court of the Philippine Islands shall be affirmed upon the hearing of said Writ of Error, will appear for judgment and render themselves to the execution thereof; and otherwise hold themselves amenable to the order and process of the court, then and in that case this undertaking shall be void; otherwise to remain in full force and effect.

(Signed) O. C. HING.
(Signed) CHAN TAT.

CITY OF MANILA,
Philippine Islands, ss:

O. C. Hing and Chan Tat, the sureties named in and who signed the foregoing obligation, each being duly sworn upon oath for himself, says that he is a resident of the Philippine Islands and that he is worth the amount specified in the foregoing undertaking over and above all just debts and obligations and exclusive of property exempt from execution.

(Signed) O. C. HING.
(Signed) CHAN TAT.

17 Subscribed and sworn to this 9th day of January, 1909, by O. C. Hing, who exhibited his personal cedula No. 1256, issued at Manila, P. I., on January 6, 1909; and by Chin Tat, who exhibited his personal Cedula No. 1255, issued at Manila, P. I., on January 6, 1909.

(Signed) J. E. BLANCO,
Clerk Supreme Court, P. I.

Manila, P. I., Jan. 9/09.

Approved:
(Signed) A. C. CARSON,
Associate Justice Supreme Court, P. I.

18 UNITED STATES OF AMERICA,
Philippine Islands:

In the Supreme Court of the Philippine Islands.

No. 4530.

THE UNITED STATES OF AMERICA, Plaintiff and Appellee,
vs.
ONG CHANG WING and KWONG FOK, Defendants and Appellants.

Stipulation.

Supreme Court of the Philippines. Clerk's Office. Filed Jan. 27, 1909. — M.

It is hereby agreed and stipulated by and between the parties to the above entitled action that the foregoing transcript of record sets forth all of the matters and proceedings necessary for the proper determination in the Supreme Court of the United States of the writ of error granted herein.

GEO. R. HARVEY,
Solicitor General of the Philippine Islands,
Attorney for Plaintiff and Appellee.
FRANK B. INGERSOLL,
Attorney for Defendants and Appellants.

19 THE UNITED STATES OF AMERICA:

In the Supreme Court of the Philippine Islands.

I, J. E. Blanco, Clerk of the Supreme Court of the Philippine Islands, do hereby certify that the foregoing eighteen pages of typewritten matter constitute a true and correct transcript of so much of the record and proceedings in Case No. 4530 of said Court, entitled Ong Chang Wing and Kwong Fok, plaintiffs in error, vs. The United States of America, defendant in error, as, according to the attached stipulation by counsel, shall be considered a complete and sufficient record of all matters necessary for a final determination by the Supreme Court of the United States of the questions of law involved in said cause; and in obedience to the writ of error herein I hereby transmit the same to the Supreme Court of the United States of America.

Witness my hand and the seal of the Supreme Court of the Philippine Islands, this twenty-seventh day of January, 1909.

[Seal Corte Suprema, Islas Filipinas.]

J. E. BLANCO,
Clerk Supreme Court of the
Philippine Islands.

20 UNITED STATES OF AMERICA,
Philippine Islands:

In the Supreme Court of the Philippine Islands.

No. 4530.

UNITED STATES OF AMERICA, Plaintiff and Appellee,
vs.
ONG CHANG WING and KWONG FOK, Defendants and Appellants.

Writ of Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Judges of the Supreme Court of the Philippine Islands, Greeting:

Because in the record and proceedings and also in the rendition of the judgment in the said Supreme Court of the Philippine Islands, before you or some of you, between the United States of America, Plaintiff and Appellee, against Ong Chang Wing and Kwong Fok, Defendants and Appellants, a manifest error hath happened, to the great damage of the said Ong Chang Wing and Kwong Fok, as appears in their petition for a Writ of Error, we, being willing that such error, if any hath happened, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this Writ, so that you may have the same at the City of Washington on the 9th day of May next, in said Supreme Court, to be then and there held, that the records and proceedings aforesaid being duly inspected, the said Supreme
21 Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 9th day of January, in the year of Our Lord one thousand nine hundred and nine and of the Independence of the United States of America the one hundred and thirty-fourth.

[Seal Corte Suprema, Islas Filipinas.]

J. E. BLANCO,
Clerk Supreme Court, P. I.

The foregoing writ is allowed and upon the filing in the office of the Clerk of this Court by said Plaintiffs in Error of a bond in the sum of Two thousand five hundred — Philippine Currency, to be approved by me, it is ordered that said Writ of Error shall operate as a supersedeas and a stay of execution.

A. C. CARSON.
Associate Justice of the Supreme Court of the Philippine Islands.

Dated Manila, P. I., 9 Jan'y, 1909.

22 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to Ignacio Villamor, Esq., Attorney General of the Philippine Islands, Attorney for the United States of America, Greeting:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States at the Capitol in the City of Washington, in the District of Columbia, on the 9th day of May, 1909, pursuant to a writ of error filed in the Clerk's office of the Supreme Court of the Philippine Islands, wherein Ong Chang Wing and Kwong Fok are Plaintiffs in Error and the United States of America is Defendant in Error, to show cause, if any there be, why the judgment in said Writ of Error mentioned should not be corrected and speedy justice should not be done in that behalf.

Given under my hand at the City of Manila, in the Supreme Court of the Philippine Islands, above named, this 9th day of January, in the year of Our Lord one thousand nine hundred and nine and the year of Independence of the United States of America the one hundred and thirty-fourth.

[Seal Corte Suprema, Islas Filipinas.]

A. C. CARSON,
Associate Justice of the Supreme Court of the Philippine Islands.

Dated Manila, P. I., Jan'y 9, 1909.

Notice of the foregoing citation is hereby acknowledged this 9th day of January, 1909.

IGNACIO VILLAMOR,
Attorney General of the Philippine Islands.

Endorsed on cover: File No. 21,987. Philippine Island Supreme Court. Term No. 761. Ong Chang Wing and Kwong Fok, plaintiffs in error, vs. The United States. Filed January 28th, 1910. File No. 21,987.

In the Supreme Court of the United States.

OCTOBER TERM, 1909.

ONG CHANG WING AND KWONG FOK,
Plaintiffs in Error,
v.
THE UNITED STATES.
} No. 761.

MOTION TO ADVANCE.

This is a criminal case commenced by information filed in the Court of First Instance for the city of Manila on September 20, 1907, charging the crime of gambling, in violation of section 343 of the Penal Code of the Philippine Islands. Defendants were convicted and sentenced to two months and one day's imprisonment and to pay a fine of 625 pesetas, which judgment and sentence were affirmed by the Supreme Court of the Philippines. On the ground that the plaintiffs in error are deprived of their liberty without due process of law, in violation of section 5 of the act of July 1, 1902, known as the "Philippine bill," this writ of error is sued out. It is claimed that prior to the submission of the cause to the Supreme Court of the Philippines for decision, the Philippine Commission enacted and put into

effect an act (No. 1757) which expressly repealed article 343 of the penal code upon which the information is based.

In accordance with the provision of rule 26, section 3, the Solicitor-General moves the court to advance the case on the docket for hearing on a day convenient to the court during the next term.

Notice of this motion has been served upon opposing counsel.

LLOYD W. BOWERS,
Solicitor-General.

MAY, 1910.

O

Supreme Court of the United States

OCTOBER TERM, 1910.

No. 418.

ONG CHANG WING AND KWONG FOK, *Plaintiffs in Error,*

vs.

THE UNITED STATES, *Defendant in Error.*

IN ERROR TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

BRIEF FOR PLAINTIFFS IN ERROR.

STATEMENT.

The plaintiffs in error were prosecuted in the Court of First Instance of the City of Manila under article 343 of the Penal Code of the Philippine Islands and were found guilty by that Court of a violation of the article mentioned, which article reads as follows:

(Quoted from "Translation of the Penal Code in force in the Philippines," issued by the War Department, 1900):

> "Art. 343. The bankers and proprietors of houses where games of chance, stakes, or hazard are played shall be punished with the penalty of *arresto mayor* and a fine of from 625 to 6,250 pesetas, and in case of a repetition with those of *arresto mayor* in its maximum degree to *prision correcsional* in its minimum degree, and a fine double the above mentioned.
>
> "The players who assemble at the houses referred to shall be punished with those of *arresto mayor* in its minimum degree and a fine of from 325 to 2,250 pesetas. In case of repetition, with that of *arresto mayor* in its medium degree and double the fine."

The alleged offense occurred on the 15th day of September, 1907. The trial was had on October 4, 1907, and on the same date the trial court rendered its judgment. From the judgment an appeal was taken to the Supreme Court of the Philippine Islands.

On October 9, 1907, while this appeal was pending, the Philippine Commission enacted Act No. 1757, entitled "An Act to Prohibit Gambling, to repeal article eighteen hundred and one of the Civil Code and articles three hundred and forty-three and five hundred and seventy-nine of the Penal Code."

Section 13 of this Act, Vol. VI, p. 402, is as follows:

> "Article eighteen hundred and one of the Civil Code and articles three hundred and forty-three and five hundred and seventy-nine of the Penal Code, and all Acts and parts of Acts inconsistent or in conflict with this Act, are hereby repealed."

This Act took effect on its passage, October 9, 1907, as provided by Section 15 thereof.

On December 15, 1908, the Supreme Court of the Philippine Islands affirmed the judgment of the lower Court.

Counsel for plaintiffs in error respectfully submit the following:

ASSIGNMENT OF ERROR.

The Supreme Court of the Philippine Islands erred in rendering a judgment depriving the defendants and appellants of their liberty without due process of law and in violation of the provisions of section 5 of the Act of Congress of July 1, 1902 (32 Stat., 691-692-693, known as the "Philippines Bill," in that on October 9, 1907, and prior to the submission of this cause to said Supreme Court for decision, the Philippine Commission enacted and put into effect Act No. 1757 which expressly repealed Article 343 of the Penal Code of the Philippine Islands, under which article these defendants and appellants were prosecuted and convicted.

BRIEF.

The defendants were prosecuted under Article 343 of the Penal Code and in the Act of the Philippine Commission of October 9, 1907, which expressly repealed Article 343, there is no saving clause regarding the prosecution of offenses occurring under the articles of the Penal Code which it repealed.

Both under the American and the Spanish law the defendants are entitled to a discharge and an acquittal.

> "If a penal statute is repealed without a saving clause, there can be no prosecution or punishment for a violation of it before the repeal." ("Cyc." Vol. 12, p. 144).
>
> "Even when the statute is repealed after the accused has been convicted, judgment must be arrested, and if an appeal from a conviction is pending when the statute is repealed the judgment of conviction must be

set aside and the indictment quashed, even though argument has been heard and the appeal dismissed, where the repeal takes place pending the proceedings." ("Cyc." Vol. 12, p. 145, and cited cases).

"Penal laws shall have a retroactive effect in so far as they favor the person guilty of a crime or misdemeanor, even though at the time of the publication of said laws a final sentence should have been pronounced and the convicted person is serving his sentence." (Article 22, Penal Code of the Philippine Islands.)

The Supreme Court of the Philippine Islands in this case followed its decision in the case of the United States vs. El Chino Cuna, reported on page 241, Vol. XII, Philippine Reports. In the Court's opinion in the last mentioned case it is admitted that under the English and American rule the defendant would be entitled to a dismissal, but it is held that this principle of common law is not in force in the Philippine Islands. Upon this point it is respectfully submitted for the consideration of the Court that the repealing Act (Act No. 1757 of the Philippine Commission) upon which the plaintiffs in error rely in this case is an American law enacted by an American legislative body and applied by an American Court.

The Philippine Supreme Court devotes its attention chiefly to the discussion of the provisions of Article 22 of the Spanish Penal Code cited by plaintiffs in error. With all respect to the author of the opinion in the Cuna case and to his learned associates it is respectfully submitted that the Spanish commentators and the decisions of the Courts of Spain do not sustain the view that the provisions of Article 22 cannot operate to relieve from liability an accused or convicted person at a time when there ceases to be in force the law under which he was prosecuted.

The opinion in the Cuna case asserts that according to the Spanish authorities, "the enactment of new penal laws,

notwithstanding the fact that they contain general repealing clauses, does not deprive the Courts of jurisdiction to try, convict and sentence persons charged with violations of the old law prior to the date when the repealing law goes into effect, unless the new law wholly fails to penalize the acts which constituted the offense defined and penalized in the repealed law."

This seems an incomplete and inexact interpretation of the Spanish rule. The correct view is set out in Viada's commentaries on the Spanish Penal Code hereinafter quoted from upon this point. The principle deduced is that at whatever stage of the proceedings (even after sentence is being served) the benefit of the provisions of Article 22 may be invoked, the accused or convicted person is entitled to receive such benefit, and if at the time the point is raised the law under which such person was convicted is no longer in force its effects die with it in the absence of a saving clause in the new law and the accused or convicted person is entitled to be discharged from custody and to be relieved from further liability.

The quotation from Pacheco on page 245, Vol. XII, Philippine Reports (U. S. vs. Cuna) does not to any extent sustain the argument of the learned justice who wrote the Cuna decision. Indeed there are intimations and even exact declarations to the contrary when Pacheco says in one place:

> "There may be prosecutions which it is necessary to dismiss, as for example, those for sodomy,"

and, in another place,

> "Has the Code increased the penalty? Then it is not applicable to crimes committed prior to the enactment. Has it *extinguished* or diminished them? Then it is clearly applicable to them."

This quotation has the qualities of a boomerang. It admittedly refers to the class of cases now under consideration and the author cited in support of the Philippine Court's opinion plainly indicates that the penalty prescribed by the prior law under which an offense was committed may be "extinguished." Nor does he in any wise intimate that the accused person may be tried under the new law.

In discussing Article 22 (numbered 23 in some editions of the Code) Viada, admittedly the leading commentator on the Spanish Penal Code, says:

> "A later penal law may estimate as excessive the penalty fixed by the prior law for a certain class of offenses and as a consequence of this valuation diminishes or abates the penalty provided for the same. It is even established, going still further, that it cannot consider as crimes certain acts which as such were defined and punished in the prior law, and therefore suppresses them and strikes them from the catalogue of acts subject to its jurisdiction. Well then, when one or the other case happens, this later law, always favorable to the person accused of a crime or misdemeanor whose penalty is abated or done away with, must be applied, extending its benefits the same to those who are still *sub judice* as to those who are serving sentence for said crime or misdemeanor. See Questions V, VI, VII and VIII of Article 10, number 18, pages 318 and 319" (Viada's Codigo Penal, Vol. 1, pages 402-3).

These "Questions" are reviews of decisions of the Supreme Court of Spain interpreting the provisions of paragraph 18 of Article 10 of the Penal Code which provides that

> "The following are aggravating circumstances:
> * * * * * * * * *
> "18. When he is a recidivist. A recidivist is the

culprit who, being found guilty of one crime should have been sentenced for another crime included under the same title of the Code."

Under the Spanish procedure, as a general rule, the penalty to be imposed upon a person convicted of crime is increased if there exist certain aggravating circumstances. Among the aggravating circumstances cited in the Code is that above referred to, *i. e.*, that of being a recidivist.

Question V (p. 318, Vol. 1, Viada) seems to exactly sustain the principle contended for by the plaintiff in error. It is as follows:

> "Question V. *Shall recidivism be taken into consideration if the crime for which the culprit was previously condemned has ceased to be such?* The Supreme Court has decided to the contrary, considering, it says, 'that according to Article 23 of the Penal Code, laws have a retroactive effect in so far as they favor the person guilty of a crime or misdemeanor even though at the time of the publication of such a law there should have been pronounced a final judgment and the condemned person should be serving his sentence. Considering that in sound reasoning this precept must necessarily include the case that we are not permitted to consider the circumstance of recidivism against the accused who might have committed an act recognized as a crime at the time of its commission but which had ceased to be such because under a contrary rule the favorable retroactivity established by the law would be ineffective: Considering that the trial Court by applying the circumstance of recidivism to the accused Juan Bautista Ruiz for an act which had ceased to be a crime under the Code in force, has committed an error of law in violation of Article 10, paragraph 18 and Articles 23 and 82, rules first and third, upon which the appeal is based; we adjudge that we must declare and we do declare the appeal interposed by the Government Fiscal is not allowed.' (Judgment of November 30, 1876, published in the Gazette of March 6, 1877.)"

Here was the case of a man who had been previously convicted of one crime and had presumably served his sentence. He was tried and convicted of a second offense included in the same title of the later Code. The prosecution endeavored to have him declared a recidivist under the later Code—an aggravating circumstance to be considered in imposing sentence. The Supreme Court of Spain held that the defendant's one-time status as a recidivist had been destroyed by reason of the fact that the law under which he was tried and convicted had ceased to exist, having been repealed and superseded by the law in effect at the time of the consideration by the Supreme Court of the later prosecution against him, *i. e.*, the one discussed in "Question V."

The general principle here set forth is identical with that contended for by the plaintiffs in error, which is that as soon as a law ceases to exist thereafter a person convicted or accused of its infraction is no longer liable and cannot legally be made to suffer any punishment for such infraction.

"Question VI" (pages 318-19, Vol. 1, Viada) is equally in point. It says:

> *"Will he who was sentenced prior to the Code of 1870 for the crime of personal injuries and now for discharging a fire-arm be a recidivist, regardless of the fact that the latter offense is included in the same title of the present Code in which there now is found that of personal injuries?"*

The Supreme Court has decided the question negatively, saying:

> "Considering, 'that in paragraph 18 of Article 10 of the Penal Code in force recidivism is qualified as an aggravating circumstance and that according to the same there is understood to be such a case when the

culprit at the time of being tried for one crime had been finally sentenced for another crime included in the same title of said Code: Considering that although Jose Cabañero, convicted in the judgment appealed from for the crime of the discharge of a fire-arm, according as appears from the same, was finally sentenced in 1865 for the crime of personal injuries, this circumstance cannot now be qualified as that of recidivism, since when Cabañero was punished for this former crime the Penal Code of 1850 was in effect, in which that circumstance designated in Number 18 of Article 10 of the same, limited recidivism to crimes of the same class and that there not being really any crime of the discharge of a fire-arm, then non-existent and created afterward by the Code of 1870, even though now both are included in the same title it is clear that said culprit cannot be clothed at present in the character of recidivist and that therefore the aggravating circumstance referred to cannot be taken into consideration: Considering from what has been stated that by not taking it into consideration the Sala has not violated Article 10, Number 18, of the Penal Code; we adjudge that we must declare and we do declare that the appeal interposed by the Government Fiscal cannot be allowed' (Judgment of March 18, 1877, inserted in the Gazette of August 10)."

"Question VII." reviewing a judgment of the Supreme Court of Spain of May 26, 1877 (p. 319, Vol. 1, Viada) and "Question VIII." reviewing a judgment of April 22, 1878 (pp. 319-20, Vol. 1, Viada) also support the principle above discussed.

As having a direct bearing on the question whether or not the general rules of American or English criminal law shall be applied to cases arising in the Philippines, we refer to the recently decided case of Weems vs. United States, 217 U. S., 349.

While that case involved the point of whether or not the

sentence imposed upon Weems fell within the prohibition in the Philippine Bill of Rights (Philippine Act of July 1, 1902, 32 Stat., 691) of cruel or unusual punishment, the very full discussion found in the opinion of this Honorable Court in that case would seem to make it plain that the underlying principles of what may be termed American criminal law, are applicable in the Philippines for the reasons so well set forth in the opinion, and in other opinions therein cited.

As counsel for plaintiff in error regard the case, it involves, when finally analyzed, practically this point:

Section 5 of the Philippines Act (32 Stat., 691-692, provides, *inter alia:*

> "That no law shall be enacted in said islands which shall deprive any person of life, liberty, or property without due process of law, or deny to any person therein the equal protection of the laws."
> * * * * * * * * *
> "That no person shall be held to answer for a criminal offense without due process of law; * * * "

Can it be held that "due process of law," as that term is used and understood in the United States, and as it was presumably used and understood by Congress when the Philippines Act was enacted, is consistent with a judgment by the Supreme Court of the Philippines that the plaintiffs in error shall be punished for infraction of a law which no longer exists on the statute books of the Philippine Islands?

Section 10 of the Philippines Act shows that Congress meant to throw about the people of the Philippines the safeguards peculiar to our own Federal constitution, and it would seem to logically follow, that in the case at bar this Honorable Court should construe the term "due process of law" in the same manner as though this case arose in one of the territories of the United States, unhampered by any

theory advanced by the Supreme Court of the Philippines as to what may have been the Spanish law relative to the effect of the repeal of a penal statute.

It is therefore submitted, in conclusion:

First. That the Supreme Court of the Philippines erred in its statement of the rule incident to the Spanish law upon this point.

Second. That even were the Supreme Court of the Philippines correct in its statement of the Spanish rule, yet still its judgment should be reversed because utterly repugnant to the definition of the term *"due process of law"* as used by Congress in the Philippines Act.

Wherefore plaintiffs in error pray a reversal of the judgment of the Supreme Court of the Philippine Islands, and that they be discharged without day.

Respectfully submitted,

CHARLES F. CONSAUL,
CHARLES C. HELTMAN,
Counsel for Plaintiffs in Error.

FRANK B. INGERSOLL,
Of Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1910.

No. 418.

ONG CHANG WING AND KWONG FOK, *Plaintiffs in Error,*

vs.

THE UNITED STATES.

IN ERROR TO SUPREME COURT OF PHILIPPINE ISLANDS.

SUPPLEMENTAL BRIEF OF PLAINTIFFS IN ERROR.

The contention of the United States before this Court may be divided under two heads, as follows:

1. Do the facts of this case show that there has been a failure in the Courts below, to proceed under *"due process of law"?*

2. Was the decision of the Supreme Court of the Philippines in accord with the principles of the common law?

We will address a few words to each of these heads.

DUE PROCESS OF LAW.

It is urged by learned counsel for the United States that the failure up to the present time, on part of the courts to precisely define the term "due process of law," so as to expressly include therein the question of effect of the repeal of a penal statute, precludes this honorable Court from considering this case. With this suggestion we cannot agree.

In the first place, we ask attention to the fact that on page 4 of the government brief it is admitted that it was the intention of Congress by the Philippine Bill "to carry some at least of the essential principles of American constitutional jurisprudence to these islands and to engraft them upon the law of this people newly subject to our jurisdiction."

On the subject of what steps fall within the term "due process of law," opposing counsel quote at length from the recent decision in case of Twining, 211 U. S., 78, but the quotations have no bearing on the present case. The quotations on pages 11-12 of the government brief merely go to show that the constitutional provision as to due process of law does not control the various *States* in prescribing legal procedure in the *State* courts. In the case at bar the decision of a *State* Court is not involved, however.

It is one of the rules of decision of this Court that even in civil cases, where general principles of commercial law, or the "law merchant" are involved, this Court will not be bound by the rules of decision adopted by the State Courts of last resort, but will declare the law to be what this Court believes it to be.

It is submitted by plaintiffs in error, without attempting to define the term "due process of law," that when the action of a Federal Court or of a Territorial Court, or of a Philippine Court, clearly contravenes a principle that has stood for many years as a general rule of decision in both American and English jurisprudence, and denies to an accused person the benefit of such general rule of decision, then such action can be properly said to be opposed to "due process of law," as used in our Federal constitution and carried into the Philippine Bill of Rights. It was evidently the intent of Congress to confer upon the people of the Philippines all the rights enjoyed by the people of the United States so far as appeared consistent with conditions existing in the Philippines, the principal right withheld from them being that of right of trial by jury.

Let us suppose that in the case at bar, the accused having been found guilty of infraction of Article No. 343, of the Penal Code, it had been shown to the Supreme Court of the Philippines that there *never had been* any such article or law. Could a sentence be upheld as in accord with "due process of law" where the supposed law *never had* existed? That would seem to be the contention of the government in this case.

Or, suppose it appeared that the law in question had been repealed before the commission of the supposed offense. Would this Court say that a sentence for infraction of the law could be sustained as being in accord with "due process of law"? We feel that these questions must be answered in the negative, as a matter of common sense.

If so, then we insist that the established rule of American and English jurisprudence is just the same where the penal statute is repealed before a final decision by the appellate tribunal, as we shall show later by citation of authorities.

It is urged by the government that the decision complained of merely *construes* the effect of the repealing law, and that therefore the question here presented is not one of "due process of law."

This cannot be accepted as a correct statement of the case. As has been said by this Court, where the words of a statute are plain and unambiguous, there is no room for *construction* (Dewey vs. U. S., 178 U. S., 510).

As the Act of the Philippine Commission of Oct. 9, 1907, in section 13, *expressly repeals* article 343 of the Penal Code, there is no room for *construction* of the later statute and the only inquiry is whether or not the later act has been given *effect* by the Supreme Court of the Philippines. There is surely a great distinction to be drawn between *construing* a statute and *ignoring* it. Plaintiffs in error maintain that the lower Court erred in refusing to give *effect* to the repealing act, and in proceeding in contravention of the later act, which action was contrary to the terms of section 5 of the Philippine Bill, and not according to due process of law.

If the lower Court can ignore the plain provisions of a *statute*, cannot it also ignore a *pardon?* If the accused had been pardoned during the pendency of their appeal to the Supreme Court of the Philippines, could it be maintained that their sentence was under "due process of law"? What is the difference in principle between the supposed case of a pardon and the one presented by repeal of the statute under which they were convicted?

It is thereby submitted that this case is properly before this honorable Court, and that the record is sufficient to show that the question of whether or not plaintiffs in error were denied due process of law, is plainly before this Court for decision.

We now come to the second point attempted to be made by the Government, *i. e.*,

Was the decision of the Supreme Court of the Philippines in accord with the principles of the common law?

The question of the effect of repeal of penal statutes was considered by this Court early in its history, and the general principles then announced have been followed ever since, by all the Courts whose reports have been examined.

In the case of U. S. vs. Schooner Peggy, 1 Cranch., 103, it was held that a judgment of condemnation of the schooner, though proper at time rendered, must be set aside because by a treaty of later date, it was provided that property not finally condemned should be restored to its owner. This Court used the following language:

> "It is in the general true that the province of an appellate court is only to inquire whether a judgment when rendered was erroneous or not. But if, subsequent to the judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied. * * * In such a case the court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside."

In case of Yeaton vs. U. S., 5 Cranch., 281, the same principle was recognized, after stating that in admiralty cases an appeal suspends the sentence and that the cause is to be heard *de novo* by the appellate court, and it was said:

> "The court is, therefore, of opinion that this cause is to be considered as if no sentence had been pronounced; and if no sentence had been pronounced, it has long been settled, on general principles, that after the expiration or repeal of a law, no penalty can be

enforced, nor punishment inflicted, for violations of the law committed while it was in force, unless some special provision be made for that purpose by statute."

From "Cyc.," Vol. 12, p. 144, we quote the following:

"Effect of Repeal. (a). In General. If a penal statute is repealed without a saving clause, there can be no prosecution or punishment for a violation of it before the repeal. * * *

Jordan vs. State, 15 Ala., 746.
Commonwealth vs. Jackson, 2 B. Mon. (Ky.), 402.
Keller vs. State, 12 Md., 322.
Commonwealth vs. McDonough, 13 Allen, 581.
Commonwealth vs. Marshall, 11 Pick., 350.
Teague vs. State, 39 Miss., 516.
State vs. Long, 78 N. C., 571.
Commonwealth vs. Duane, 1 Binn. (Pa.), 601.
Commonwealth vs. Dolan, 4 Pa. Co. Ct., 287.
State vs. Lewis, 33 S. E., 351 (S. Ca.).
State vs. Mansel, 52 S. C., 468.
Greer vs. State, 22 Tex., 588.
Halfin vs. State, 5 Tex. App., 212.
Roberts vs. State, 2 Overt. (Tenn.), 423.
Wharton vs. State, 5 Coldw. (Tenn.), 1.
Bennett vs. State, 2 Yerg., 472 (Tenn.).

(b) Effect on Pending Prosecution. Even when an indictment has been found and a prosecution is pending under a statute at the time of its repeal, without a saving clause, there can be no conviction under the statute after the repeal.

Carlisle vs. State, 42 Ala., 423.
Griffin vs. State, 39 Ala., 541.
Mayers vs. State, 7 Ark., 68.
People vs. Tisdale, 57 Cal., 104.
Day vs. Clinton, 6 Ill. App., 476.

Hartung vs. People, 22 N. Y., 95.
U. S. vs. Passmore, 4 Dall., 372.
U. S. vs. Finlay, 25 Fed Cas., No. 15,099.
Regina vs. Mawgan, 8 A. & E., 496.

(c) Effect After Conviction or Pending Appeal. Even when the statute is repealed after the accused has been convicted, judgment must be arrested

Commonwealth vs. Jackson, 2 B. Mon. (Ky.), 402.
Commonwealth vs. Kimball, 21 Pick., 373.
Commonwealth vs. Marshall, 11 Pick., 350.

And if an appeal from a conviction is pending when the statute is repealed, the judgment of conviction must be set aside and the indictment quashed,

Speckert vs. Louisville, 78 Ky., 287.
Smith vs. State, 45 Md., 49.
Keller vs. State, 12 Md., 322.
Commonwealth vs. Kimball, 21 Pick., 373.
Commonwealth vs. Marshall, 11 Pick., 350.

even though argument has been heard and the appeal dismissed" (Keller vs. State, 12 Md., 322), where the repeal takes place pending the proceedings (State vs. Henderson, 13 La. Ann., 489; Wall vs. State, 18 Tex., 682).

From among the cases above cited, we refer specially to the case of Keller vs. State, 12 Md., 322, in which case it appeared that the statute under which Keller was convicted had been repealed *after argument of his appeal* before the Supreme Court of the State.

As the repeal was not brought to the attention of the Appellate Court, the judgment of conviction was affirmed. Later, on motion for rehearing, the judgment of conviction was reversed, the Court saying:

"It is well settled, that a party cannot be convicted, after the law under which he may be prosecuted has been repealed, although the offense may have been committed before repeal. (Dwarris, 670; 1 Kent., 465; State vs. R. R. Co., 12 G. & J., 399.) The same principle applies where the law is repealed, or expires pending an appeal on a writ of error from the judgment of an inferior court."

Citing U. S. vs. Schooner Peggy, 1 Cr., 103.
Yeaton vs. U. S., 5 Cr., 581.
U. S. vs. Ship Helen, 6 Cr., 203.
U. S. vs. Preston, 3 Pet., 57.
Maryland vs. R. R. Co., 3 How., 534.

In case of Smith vs. State, 45 Md., 49, the particular statute under which Smith was tried, had been repealed *after* his *conviction*. The Court said:

"The repeal of a law imposing a penalty, is of itself, a remission of the penalty where there is no reservation.

"A party cannot be adjudged guilty after the law, under which he may have been prosecuted and convicted, has been repealed, although the offense may have been committed before the repeal."

From the foregoing, it would seem that learned counsel for the United States have erred in contending that the decision of the Supreme Court of the Philippines was in accord with the common law, as this Court and other Courts of last resort have all laid down a rule directly contrary to that followed by the Philippine Court.

In this connection, we are not unaware of the effect sometimes given to what may be called a repeal by a continuing statute, the law being not actually changed, but it is submitted that in none of the decisions applying that principle is it found applied to a criminal case.

In any event, the later act of the Philippine Commission could not be termed a continuation of the Article No. 343 of the Penal Code, for, under the *later* act, in order to secure a conviction, it must be proven that the accused have conducted a gambling house in which gambling is *"frequently"* carried on, or in which gambling is reputed to be *"frequently"* carried on. This adds a further condition to conviction, and it cannot be said that on this record the accused could be found guilty of infraction of this later act, as argued, in effect, by counsel for the Government.

In their attempt to show the judgment of the Supreme Court of the Philippines to be in accord with the common law, counsel for the Government refer to only two cases, both of which are readily distinguishable from the case at bar, and neither of which is at all opposed to the general principles for which plaintiffs in error here contend.

The first case relied upon by opposing counsel is that of State vs. Addington, 2 Bailey, S. C. Law, 516. In that case, however, *final judgment* had been rendered, so that, at date of the repeal in question, there was no proceeding or cause *pending* in any Court. In the case at bar, however, the repeal occurred during the time allowed for appeal from the Court of First Instance.

The other case cited is that of Aaron vs. State, 40 Ala., 307, and it appears that in this case, after the accused had been sentenced to be hanged, and day for execution appointed, the law under which he was convicted was repealed, and the accused was *freed*, on account of the repeal.

Assuredly these two cases cited by opposing counsel cannot overturn the long line of decisions cited by plaintiffs in error, including, as they do, decisions by this Court, and of various other Courts of last resort.

In conclusion, therefore, it is submitted that when the judgment of conviction given by the Supreme Court of the

Philippines was rendered, there was no more authority in law for that judgment than as if there never had been any statute governing the supposed offense, and for that reason the Supreme Court of the Philippines has sought to impose a penalty without due process of law, and its judgment should be reversed.

Respectfully submitted,

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Attorneys for Plaintiffs in Error.

FRANK B. INGERSOLL,
Of Counsel.

In the Supreme Court of the United States.

OCTOBER TERM, 1910.

ONG CHANG WING AND KWONG FOK, plaintiffs in error, *v.* THE UNITED STATES. } No. 418.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This case comes here on writ of error directed to the Supreme Court of the Philippine Islands. Plaintiffs in error were tried, convicted, and sentenced on October 4, 1907, in the Court of First Instance of the city of Manila, for violation of article 343 of the Philippine Penal Code, which made it an offense to own a gambling house, or be a banker therein. (Rec., p. 6.) On October 17 they appealed to the Supreme Court of the Philippine Islands, in which court they contended that since they had been prosecuted under the provisions of article 343 of the Penal Code for an offense committed September 15, 1907, and after that date, on October 9, the Philippine Commission had enacted act No. 1757, entitled "An act to prohibit gambling," repealing article 343, the appellate

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court had no authority to affirm the judgment given after conviction under the repealed article of the Penal Code.

The Supreme Court of the Philippine Islands found no error in the proceedings prejudicial to the rights of the accused, and affirmed the judgment below, on the authority of a previous decision of the court, *United States* v. *Cuna*. (12 Philippine Reports, 241.)

It is important to observe that act No. 1757, repealing article 343, did not legalize games of chance, but rather made more specific the description of the offense. In other words, the acts for the commission of which the plaintiffs in error had been convicted and sentenced under article 343 remained an offense under act No. 1757; the crime of gambling was not abolished.

The single assignment of error contained in the record and urged by the plaintiffs in error reads as follows (Record, folio 14):

> The Supreme Court of the Philippine Islands erred in rendering a judgment depriving the defendants and appellants of their liberty without due process of law and in violation of the provisions of section 5 of the act of Congress of July 1, 1902, known as the "Philippines Bill," in that on October 9, 1907, and prior to the submission of this cause to said Supreme Court for decision, the Philippine Commission enacted and put into effect act No. 1757, which expressly repealed article 343 of the Penal Code of the Philippine Islands under which article these defendants and appellants were prosecuted and convicted.

The only question for consideration, therefore, is whether the action of the Philippine court in refusing to reverse the judgment of conviction under the circumstances stated amounted to a deprivation of the liberty of defendants without due process of law in violation of section 5 of the Philippines bill.

ARGUMENT.

I.

THE PRIVILEGE OR RIGHT ASSERTED BY PLAINTIFFS IN ERROR IS NOT AN ELEMENT OF DUE PROCESS OF LAW.

The proposition of the plaintiffs in error, briefly stated, is that due process of law requires that a person lawfully tried, convicted, and sentenced shall go free if before the execution of the sentence the statute under which he has been convicted is superseded and repealed by another statute, although the latter statute retain the offense in the catalogue of crimes. The plaintiffs in error demand that they shall go free, in spite of the fact that statute No. 1757, which repealed article 343, preserved gambling among the list of offenses punishable by the law. To state their proposition is to refute it.

Even if we assume that the common law rule was as stated by the defendants, and that according to that law a criminal lawfully convicted and sentenced escaped the penalty of his crime if the statute under which he had been convicted was repealed before the execution of the sentence, an argument which we shall show later on is untenable, nevertheless this so-called right of the defendants in no decision of any

of the state or federal courts has been mentioned as being an element of "due process of law." There is a violation of due process of law only when one of the fundamental rights of an individual has been arbitrarily invaded by the power of government.

We admit that it was the intention of Congress by the so-called Philippine Bill of Rights contained in section 5 of the act of July 1, 1902 (32 Stat., 692), "to carry some at least of the essential principles of American constitutional jurisprudence to these islands, and to engraft them upon the law of this people newly subject to our jurisdiction."

Kepner v. *United States*, 195 U. S., 100, 122.
Dorr v. *United States*, 195 U. S., 138.
Trono v. *United States*, 199 U. S., 521.
Serra v. *Mortiga*, 204 U. S., 370, 474.
Weems v. *United States*, 217 U. S., 349.

But it has also been settled that the guarantees which Congress has extended to the Philippines are to be interpreted as meaning what the like provisions meant in the United States at the time when Congress made them applicable to the Philippines.

In the Kepner case Mr. Justice Day, after quoting section 5 of the Philippines bill, said (195 U. S., p. 123):

> These words are not strange to the American lawyer or student of constitutional history. They are the familiar language of the bill of rights, slightly changed in form, but not in substance, as found in the first nine amendments to the Constitution of the United States, with the omission of the provision preserving

> the right to trial by jury and the right of the people to bear arms, and adding the prohibition of the thirteenth amendment against slavery or involuntary servitude except as a punishment for crime, and that of Article I, section 9, to the passage of bills of attainder and ex post facto laws. These principles were not taken from the Spanish law; they were carefully collated from our own Constitution, and embody almost verbatim the safeguards of that instrument for the protection of life and liberty.
>
> When Congress came to pass the act of July 1, 1902, it enacted, almost in the language of the President's instructions, the bill of rights of our Constitution. In view of the expressed declaration of the President, followed by the action of Congress, both adopting, with little alteration, the provisions of the bill of rights, there would seem to be no room for argument that in this form it was intended to carry to the Philippine Islands those principles of our Government which the President declared to be established as rules of law for the maintenance of individual freedom, at the same time expressing regret that the inhabitants of the islands had not theretofore enjoyed their benefit.

In *Serra* v. *Mortiga* (204 U. S., 470) Mr. Justice White said (p. 474):

> It is settled that by virtue of the bill of rights enacted by Congress for the Philippine Islands (32 Stat., 691, 692), that guarantees equivalent to the due process and equal pro-

> tection of the law clause of the fourteenth amendment, the twice in jeopardy clause of the fifth amendment, and the substantial guarantees of the sixth amendment, exclusive of the right to trial by jury, were extended to the Philippine Islands. It is further settled that the guarantees which Congress has extended to the Philippine Islands are to be interpreted as meaning what the like provisions meant at the time when Congress made them applicable to the Philippine Islands. (*Kepner* v. *United States*, 195 U. S., 100.)

In *Weems* v. *United States* (217 U. S., 349) the court held that the provision in the Philippine bill of rights prohibiting cruel and unusual punishment must have the same meaning as the similar clause in the Constitution of the United States. Mr. Justice McKenna said (p. 367):

> The provision of the Philippine bill of rights prohibiting the infliction of cruel and unusual punishment was taken from the Constitution of the United States and must have the same meaning. This was decided in *Kepner* v. *United States* (195 U. S., 100, 122) and *Serra* v. *Mortiga* (204 U. S., 470).

This question then remains: Is the right asserted by the plaintiffs in error in this case an element of "due process of law" within the meaning given to that phrase by any American court at the time of the enactment of the Philippine bill?

The latest authoritative discussion of "due process of law" is contained in the exhaustive opinion delivered by Mr. Justice Moody in the Twining case (211

U. S., 78) decided November 9, 1908. In that case this court held that exemption from compulsory incrimination is not an element of "due process of law," and that the words as used in the fourteenth amendment do not require that the individual be exempted from compulsory self-incrimination in the courts of a State. Mr. Justice Moody said, page 99:

> Few phrases of the law are so elusive of exact apprehension as this. Doubtless the difficulties of ascertaining its connotation have been increased in American jurisprudence, where it has been embodied in constitutions and put to new uses as a limit on legislative power. This court has always declined to give a comprehensive definition of it, and has preferred that its full meaning should be gradually ascertained by the process of inclusion and exclusion in the course of the decisions of cases as they arise.

In determining whether the exemption from self-incrimination is an element of due process the learned justice asked these questions (p. 106):

> Is it a fundamental principle of liberty and justice which inheres in the very idea of free government, and is the inalienable right of a citizen of such a government? If it is, and if it is of a nature that pertains to process of law, this court has declared it to be essential to due process of law.

And on page 107:

> The question before us is the meaning of a constitutional provision which forbids the States to deny to any person due process of

law. In the decision of this question we have the authority to take into account only those fundamental rights which are expressed in that provision, not the rights fundamental in citizenship, state or national, for they are secured otherwise, but the rights fundamental in due process, and therefore an essential part of it. We have to consider whether the right is so fundamental in due process that a refusal of the right is a denial of due process. One aid to the solution of the question is to inquire how the right was rated during the time when the meaning of due process was in a formative state and before it was incorporated in American constitutional law. Did those who then were formulating and insisting upon the rights of the people entertain the view that the right was so fundamental that there could be no due process without it? It has already appeared that, prior to the formation of the American Constitution, in which the exemption from compulsory self-incrimination was specifically secured, separately, independently, and side by side with the requirement of due process, the doctrine was formed, as other doctrines of the law of evidence have been formed, by the course of decision in the courts covering a long period of time. Searching further, we find nothing to show that it was then thought to be other than a just and useful principle of law. None of the great instruments in which we are accustomed to look for the declaration of the fundamental rights made reference to it. The privilege was not dreamed of for hundreds of years after Magna Charta (1215), and could not have been

implied in the "law of the land" there secured. The petition of right (1629), though it insists upon the right secured by Magna Charta to be condemned only by the law of the land, and sets forth by way of grievance divers violations of it, is silent upon the practice of compulsory self-incrimination, though it was then a matter of common occurrence in all the courts of the realm. The bill of rights of the first year of the reign of William and Mary (1689) is likewise silent, though the practice of questioning the prisoner at his trial had not then ceased. The negative argument which arises out of the omission of all reference to any exemption from compulsory self-incrimination in these three great declarations of English liberty (though it is not supposed to amount to a demonstration) is supported by the positive argument that the English courts and Parliaments, as we have seen, have dealt with the exemption as they would have dealt with any other rule of evidence, apparently without a thought that the question was affected by the law of the land of Magna Charta, or the due process of law which is its equivalent.

And on page 110:

The decisions of this court, though they are silent on the precise question before us, ought to be searched to discover if they present any analogies which are helpful in its decision. The essential elements of due process of law, already established by them, are singularly few, though of wide application and deep sig-

nificance. We are not here concerned with the effect of due process in restraining substantive laws, as, for example, that which forbids the taking of private property for public use without compensation. We need notice now only those cases which deal with the principles which must be observed in the trial of criminal and civil causes. Due process requires that the court which assumes to determine the rights of parties shall have jurisdiction (*Pennoyer* v. *Neff*, 95 U. S., 714, 733; *Scott* v. *McNeal*, 154 U. S., 34; *Old Wayne Life Association* v. *McDonough*, 204 U. S., 8) and that there shall be notice and opportunity for hearing given the parties (*Hovey* v. *Elliott*, 167 U. S., 409 *Roller* v. *Holly*, 176 U. S., 398; and see *Londoner* v. *Denver*, 210 U. S., 373). Subject to these two fundamental conditions, which seem to be universally prescribed in all systems of law established by civilized countries, this court has up to this time sustained all state laws, statutory or judicially declared, regulating procedure, evidence and methods of trial, and held them to be consistent with due process of law. (*Walker* v. *Sauvinet*, 92 U. S., 90; *Re Converse*, 137 U. S., 624; *Caldwell* v. *Texas*, 137 U. S., 692; *Leeper* v. *Texas*, 139 U. S., 462; *Hallinger* v. *Davis*, 146 U. S., 314; *McNulty* v. *California*, 149 U. S., 645; *McKane* v. *Durston*, 153 U. S., 684; *Iowa Central* v. *Iowa*, 160 U. S., 389; *Lowe* v. *Kansas*, 163 U. S., 81; *Allen* v. *Georgia*, 166 U. S., 138; *Hodgson* v. *Vermont*, 168 U. S., 262; *Brown* v. *New Jersey*, 175 U. S., 172; *Bolin* v. *Nebraska*, 176 U. S., 83; *Maxwell* v. *Dow*, 176

U. S., 581; *Simon* v. *Craft*, 182 U. S., 427; *West* v. *Louisiana*, 194 U. S., 258; *Marvin* v. *Trout*, 199 U. S., 212; *Rogers* v. *Peck*, 199 U. S., 425; *Howard* v. *Kentucky*, 200 U. S., 164; *Rawlins* v. *Georgia*, 201 U. S., 638; *Felts* v. *Murphy*, 201 U. S., 123.)

Among the most notable of these decisions are those sustaining the denial of jury trial both in civil and criminal cases, the substitution of informations for indictments by a grand jury, the enactment that the possession of policy slips raises a presumption of illegality, and the admission of the deposition of an absent witness in a criminal case. The cases proceed upon the theory that, given a court of justice which has jurisdiction and acts, not arbitrarily but in conformity with a general law, upon evidence, and after inquiry made with notice to the parties affected and opportunity to be heard, then all the requirements of due process, so far as it relates to procedure in court and methods of trial and character and effect of evidence, are complied with. Thus it was said in *Iowa Central* v. *Iowa* (160 U. S., 393): "But it is clear that the fourteenth amendment in no way undertakes to control the power of the State to determine by what process legal rights may be asserted or legal obligations be enforced, provided the method of procedure adopted gives reasonable notice and affords fair opportunity to be heard before the issues are decided;" and in *Louisville and Nashville Railroad Company* v. *Schmidt* (177 U. S., 230, 236): "It is no longer open to contention that the due process

clause of the fourteenth amendment to the Constitution of the United States does not control mere forms of procedure in state courts or regulate practice therein. All its requirements are complied with, provided in the proceedings which are claimed not to have been due process of law the person condemned has had sufficient notice and adequate opportunity has been afforded him to defend;" and in *Hooker* v. *Los Angeles* (188 U. S., 314, 318): "The fourteenth amendment does not control the power of a State to determine the form of procedure by which legal rights may be ascertained, if the method adopted gives reasonable notice and affords a fair opportunity to be heard;" and in *Rogers* v. *Peck* (199 U. S., 435): "Due process of law guaranteed by the fourteenth amendment, does not require the State to adopt a particular form of procedure, so long as it appears that the accused has had sufficient notice of the accusation and an adequate opportunity to defend himself in the prosecution." It is impossible to reconcile the reasoning of these cases and the rule which governed their decision with the theory that an exemption from compulsory self-incrimination is included in the conception of due process of law.

Finally he said, p. 113:

Even if the historical meaning of due process of law and the decisions of this court did not exclude the privilege from it, it would be going far to rate it as an immutable principle of justice which is the inalienable possession of every citizen of a free government. Salutary as the

> principle may seem to the great majority, it can not be ranked with the right to hearing before condemnation, the immunity from arbitrary power not acting by general laws, and the inviolability of private property.

Applying the principles laid down by this court in the Twining case in deciding that the privilege against self incrimination is not an element of due process of law, it is clear that the phrase does not include a right like that asserted by the plaintiffs in error in this case.

Plaintiffs in error have been accorded all the rights and privileges required by "due process of law." The Supreme Court of the Philippines examined the record and held (Record, folio 10, page 6) by Carson J.:

> The guilt of the appellants of the crime with which they were charged and convicted is fully established by the evidence of record, and we find no error in the proceedings prejudicial to the rights of the accused.

They have had a hearing in the highest court of the Philippine Islands, which has denied their contention that the repeal of article 343 makes void the sentence imposed upon them.

II.

AS THE RIGHT ASSERTED BY THE PLAINTIFFS IN ERROR DOES NOT COME WITHIN THE CONCEPTION OF DUE PROCESS OF LAW, THE WRIT OF ERROR MUST BE DISMISSED, FOR THERE IS NO OTHER GROUND ON WHICH THIS COURT CAN TAKE JURISDICTION.

The appellate jurisdiction of the Supreme Court of the United States to review a decision of the Supreme Court of the Philippine Islands is created by

section 10 of the Philippines bill. (Act of July 1, 1902, 32 Stat., 695.) That section provides:

> SEC. 10. That the Supreme Court of the United States shall have jurisdiction to review, revise, reverse, modify, or affirm the final judgments and decrees of the Supreme Court of the Philippine Islands in all actions, cases, causes, and proceedings now pending therein or hereafter determined thereby in which the Constitution or any statute, treaty, title, right, or privilege of the United States is involved, or in causes in which the value in controversy exceeds twenty-five thousand dollars, or in which the title or possession of real estate exceeding in value the sum of twenty-five thousand dollars, to be ascertained by the oath of either party or of other competent witnesses, is involved or brought in question; and such final judgments or decrees may and can be reviewed, revised, reversed, modified, or affirmed by said Supreme Court of the United States on appeal or writ of error by the party aggrieved, in the same manner, under the same regulations, and by the same procedure, as far as applicable, as the final judgments and decrees of the circuit courts of the United States.

The only assignment of error stated in the record is that the judgment of the Philippine court deprived the defendants "of their liberty without due process of law, and in violation of the provisions of section 5" of the Philippines bill, in that on October 9, 1907, after the judgment of conviction but before the appeal to the Supreme Court of the Philippine

Islands, act No. 1757 was enacted, which expressly repealed article 343. Therefore if the right asserted by the plaintiffs in error is not an element of due process of law they have suggested no ground upon which this court can review the decision of the Philippine court. (Weems *v.* United States, 217 U. S., 349.)

But even if the court should look beyond the assignment of error it will find no reason to take jurisdiction. This is not a case "in which the Constitution or any statute, treaty, title, right, or privilege of the United States is involved." The decision below involved merely an interpretation of an act of the Philippine assembly, and the effect of that act upon an earlier act; the court held that the effect of a repealing statute was not to suspend the execution of all sentences imposed under a prior act.

The defendants were lawfully tried, convicted, and sentenced for a violation of article 343 of the Philippine Penal Code. When they appealed from the judgment of the Court of First Instance to the Supreme Court of the Philippine Islands no right conferred by the Constitution and extended to the Philippines by the Philippine bill or other act of Congress had been violated, and if the act of October 9, 1907, had not been passed, no question could have risen but that they would have been lawfully sentenced. The case could not have come to this court.

The Philippine assembly had authority to repeal article 343. The repeal of the statute under which they had been convicted did not impair any rights of

of the defendants. They had no constitutional right to demand that article 343 should be repealed. This being so, how can the question whether the act repealing article 343 did or did not make the execution of the sentence impossible affect any right conferred by the United States? It is clear that if the Philippine assembly had so desired, it could have added to act 1757 a proviso that the repeal of article 343 should not affect violations of that article already committed or proceedings pending thereunder. Such a proviso would have prevented the defendants making the point on appeal that act 1757 had made impossible the execution of the sentence imposed. If act 1757 had contained such a proviso, defendants could not have brought the case here by claiming that the insertion of the clause had deprived them of liberty without due process of law. The Philippine assembly omitted such a clause, but the Philippine court has construed the act as not relieving defendants from the sentence. The decision was merely that court's interpretation of the effect of one Philippine act on another Philippine act, and this court has no power under section 10 of the Philippine bill to review the question decided.

Whether the Philippine legislature in repealing 343 should or should not make impossible the execution of sentences imposed under it was a matter for the Philippine legislature. Whether its act did or did not have that effect was a question for the Philippine courts to decide.

The opinion of the Supreme Court of the Philippine Islands was based on an earlier decision in *United States* v. *Cuna* (12 Philippine Reports, 241). That case was an information for selling opium contrary to law, the crime having been committed on June 30, 1907. The act under which the information was brought was repealed by an act passed October 10, 1907, effective October 17. The defendant demurred to the information on the ground that the act under which the information was brought had been repealed during the pendency of the case, and that the repealing law did not contain any clause saving pending cases. The trial court sustained the demurrer and dismissed the information, but the Supreme Court of the Philippine Islands reversed this judgment and remanded the case for further proceedings in accordance with law.

Of course, on the facts the Cuna case is to be distinguished from the case at bar in that the statute was repealed before conviction and sentence. The court admitted that under the common law a repeal of the statute before trial prevents the imposition of any sentence, but it refused to apply this law to the Philippine Islands. The court said (p. 244):

> But neither English nor American common law is in force in these islands, nor are the doctrines derived therefrom binding upon our courts, save only in so far as they are founded on sound principles applicable to local conditions, and are not in conflict with existing law; and, in our opinion, the common-law rule of inter-

pretation just cited is in conflict with existing law in these islands, and directly opposed to the rule of interpretation laid down by the Supreme Court of Spain and the learned commentators on Spanish written law; and, in the language of a learned American judge, "the rule is an arbitrary one, and never had anything to commend it, except in the United States an undue sympathy for wrongdoers, and in England an early prejudice among common-law judges against 'statute-made law.'" (Opinion of Judge Deady, *Eastman* v. *Clackamas Co.*, 32 Fed. Rep., 24, 33.)

Article 1 of the Penal Code in force in these islands defines crimes and misdemeanors as voluntary acts or omissions penalized by the law; and complementary to this provision, article 21 provides that no crime or misdemeanor shall be punished with a penalty which has not been prescribed by law prior to its commission. In accordance with these provisions the question whether an act is punishable or not depends upon the question whether or *not at the time of its commission* there was a law in force which penalized it; this rule being modified, however, by article 22 of the same code, which provides that penal laws shall have a retroactive effect in so far as they favor persons convicted of a crime or misdemeanor, and this notwithstanding the fact that at the time of the enactment of such laws final judgment may have been pronounced and the convict may have entered upon the execution of his sentence.

The courts of Spain and the learned commentators on Spanish law have construed these

provisions to mean that penal laws are to be given a retroactive effect only in so far as they favor the defendant charged with a crime or a misdemeanor, and that when a penal law is enacted repealing a prior law such repeal does not have the effect of relieving an offender in whole or in part of penalties already incurred under the old law, unless the new law favors the defendant by diminishing the penalty or doing away with it altogether, and then only to the extent to which the new law is favorable to the offender. In other words, that the enactment of new penal laws, notwithstanding the fact that they contain general repealing clauses, does not deprive the courts of jurisdiction to try, convict, and sentence persons charged with violations of the old law prior to the date when the repealing law goes into effect, unless the new law wholly fails to penalize the acts which constituted the offense defined and penalized in the repealed law.

Thus Pacheco, commenting upon the new Penal Code of 1848–1850, of which article 506 provided that all general penal laws were repealed by its publication, says:

"At this time when the Penal Code is being put into effect and given force, we have in fact two criminal laws in Spain, and close attention is necessary to apply them properly. There may be prosecutions which it is necessary to dismiss, as, for example, those for sodomy; others which it may be necessary to decide in conformity with the provisions of the new code, as, for example, those for carrying concealed weapons; and others which must be judged in accordance with the old

provisions, as, for example, many cases of robbery. The rules of procedure in one or other manner being furnished us by the former article (article 19 of the Penal Code of Spain identical with article 21 of the Penal Code of the Philippines), and present article (article 20 of the Penal Code of Spain and article 22 of the Philippine Code). Has the code increased the penalty? Then it is not applicable to crimes committed prior to its enactment. Has it extinguished or diminished them? Then it is clearly applicable to them." (1 Pacheco, 296.)

And a similar construction was placed upon the provisions of the Penal Code of 1870 by the Supreme Court of Spain. Article 626 of this code (which is substantially identical with article 506 of the Penal Code of 1848 and article 611 of the Penal Code of the Philippine Islands) repealed all general penal laws prior to its promulgation, but the court held that, where a crime was committed prior to the publication of the reformed code, the penalty prescribed by the code of 1850 (the code prior to that of 1870) being more favorable to the accused, that must be applied. (Decision of the Supreme Court of Spain, 17th of January, 1873.)

It is contended, however, that the general provisions of the Penal Code thus construed are not applicable to acts of the commission or of the Philippine legislature defining and penalizing offenses, these provisions being limited in their application to the subject-matter embraced in the code itself. In answer to this suggestion it is said that, while all the provi-

sions of the Penal Code may not be applicable to special acts defining and penalizing offenses, article 22 of that code prescribes a rule of general application, and in the absence of other provisions this rule is universally applicable in all cases where new penal laws repeal former laws touching the same subject-matter.

For the purposes of this decision, however, it is not necessary to determine this question, because the penalty prescribed in both acts under consideration is the same, and, even if the rule prescribed in article 22 of the code were not applicable to acts of the commission or of the Philippine legislature, article 3 of the preliminary title of the Spanish Civil Code, still in force in the Philippines, which treats of laws in general, their effect, and general rules for application, provides that laws in general shall not have a retroactive effect, if the contrary is not expressly provided; so that, if it be granted that the express provision of article 22, prescribing that penal laws shall not have retroactive effect save only where favorable to the offender, is not applicable to acts of the Philippine Commission or the Philippine legislature, then it must be held under this provision of the Civil Code that such acts can have no retroactive effect whatever; and the reasoning advanced in support of the Spanish doctrine as to the effect of general repealing clauses in the code, which is based upon a comparative examination of the limited retroactive effect given its provisions in article 22, read together with articles 3 and 21 (which undoubtedly declare principles of universal application), applies to such acts with

> equal if not greater force and cogency, since, unless article 22 be held to apply to them, these acts can have no retroactive force whatever.
>
> We conclude, therefore, that the doctrine of English and American common law relied upon by counsel for defendant is not and has not been the accepted doctrine in this jurisdiction, and that, in accordance with the accepted doctrine, the courts in these islands are not deprived of jurisdiction to try, convict, and sentence offenders who have violated the provisions of act No. 1461 prior to the date when act No. 1761 went into effect, notwithstanding the provision of the latter act repealing act No. 1461; and that the penalty prescribed by the repealing act for the violation charged in the information not being more favorable to the accused than that prescribed in the old law, the penalty to be imposed is that prescribed by the old law. But we expressly reserve our opinion as to which penalty would properly be imposed in a case wherein a later act of the commission or the Philippine legislature imposed a more favorable penalty than that prescribed in a repealed act.

This decision of the Supreme Court of the Philippine Islands is conclusive here.

In *Perez* v. *Fernandez* (202 U. S., 80) Mr. Justice Day said (p. 91):

> Cases which have come to this court from the Philippines and Porto Rico, where we have had occasion to consider the enactments making changes in the laws of those islands, show the disposition of the Executive and

> Congress not to interfere more than is necessary with local institutions, and to engraft upon the old and different system of jurisprudence established by the civil law only such changes as were deemed necessary in the interest of the people, and in order to more effectually conserve and protect their rights. (*Kepner* v. *United States*, 195 U. S., 100, 122.)

The President's instructions for the guidance of the commissioners of the Philippine Islands, April 7, 1900, Compilation of the Acts of the Philippine Commission, page 14, provided:

> The main body of the laws which regulate the rights and obligations of the people should be maintained with as little interference as possible. Changes made should be mainly in procedure and in the criminal laws to secure speedy and impartial trials, and at the same time effective administration and respect for individual rights.

Speaking of the people of the Philippine Islands, he also said:

> The measures adopted should be made to conform to their customs, their habits, and even their prejudices, to the fullest extent consistent with the accomplishment of the indispensable requisites of just and effective government.

These instructions were ratified by Congress in the so-called Philippines bill, act of July 1, 1902 (32 Stat., 691).

Even if the rule of the common law were as stated by the plaintiffs in error, the common law has not

been extended to the Philippines by any act of Congress. It can be incorporated into the law of those islands only by legislative enactment. Even if this court may inquire what the rule of the common law is, it has no authority to declare that the Philippine court shall adopt the rule of the common law or of the civil law. Its appellate jurisdiction is limited by section 10, quoted above (p. 13).

III.

THE DECISION OF THE SUPREME COURT OF THE PHILIPPINES WAS IN ACCORD WITH THE PRINCIPLES OF THE COMMON LAW.

Although article 343 was repealed by act 1757 it continued to be an offense to be a banker in or proprietor of a gambling house in the Philippines, for the latter enactment did not abolish the crime but only made more specific the description of the offense. The law remained as it had been. A repeal of a criminal statute for the purpose of abolishing the crime is to be distinguished from a repeal effected by a merely superseding statute. In the one case the legislative authority has changed the law, for it has willed that certain acts shall no longer constitute a crime; it has diminished by one the catalogue of crimes. In the other case it has not changed the law, but has described the offense more clearly.

The penalty was not diminished by No. 1757, the repealing statute. The plaintiffs in error had been sentenced to two months and one day of arresto mayor, with the accessory of section 61, and to pay

a fine of 625 pesetas, and in default thereof to suffer subsidiary punishment which shall not exceed one-third of the penalty and costs (Rec., p. 6, folio 9).

Article 61 of the Penal Code provides that the penalty of arresto mayor shall include suspension from any office and from the right of suffrage during the term of the sentence.

Act No. 1757, section 3 (Compilation of Acts of the Philippine Commission, chap. 301, sec. 3151), imposes a fine of not less than 10 pesos nor more than 500 pesos, or by imprisonment for not more than one year, or by both such fine and imprisonment in the discretion of the court.

Section 343 of the Penal Code of the Philippines provides:

> The bankers and proprietors of houses where games of chance, stakes, or hazard are played shall be punished with the penalty of arresto mayor and a fine of from 625 to 6,250 pesetas, and in case of a repetition with those of arresto mayor in its maximum degree to *prision correccional* in its minimum degree, and a fine double the above mentioned.
>
> The players who assemble at the houses referred to shall be punished with those of arresto mayor in its minimum degree and a fine of from 325 to 3,250 pesetas. In case of repetition, with that of arresto mayor in its medium degree and double the fine.

The penalty of arresto mayor is imprisonment of from one month and one day to six months (Penal Code, article 28). Prision correccional is imprisonment from six months and one day to six years.

After final judgment is pronounced, the power of the court over the subject-matter is at an end; the ministerial act of executing the sentence is all that remains to be done.

In *State* v. *Addington* (2 Bailey S. C. Law, 516) the defendant was convicted of horse stealing, and in May, 1830, received judgment of death, to be executed on June 11, but he was pardoned by the governor on condition that he should receive thirty-nine lashes and leave the State, never to return. He failed to leave the State, and subsequently was arrested by a warrant on January 27, 1831. In December, 1830, the legislature in place of death substituted whipping, fine, and imprisonment as a punishment for horse stealing. The defendant was brought up on motion to show cause why execution of his sentence should not be ordered. The lower court held that that part of the act of 1789 which made horse stealing punishable by death having been repealed, the prisoner should be discharged. On appeal this order was reversed. The court said, page 518:

> When, however, the new law repeals the law creating the offense, or substitutes a mitigated punishment, Sergeant Hawkins says that the offender can not be punished in respect of the former law. (1 Hawk. P. C., ch. 40, sec. 6.) This is doubtless an exception to the general rule, founded on principles of humanity; and it has been insisted that the prisoner's case falls within it. But, for the most obvious reasons, it can never apply to res judicata, for when once the final judgment is pro-

nounced the power of the court over the subject-matter is at an end, and all that remains to be done is the mere ministerial act of doing execution. This principle is plainly inculcated by Chief Justice Marshall, in the case of *Yeaton* v. *The United States* (5 Cranch, 281), where, in giving effect to the rule that after the repeal or expiration of a law no penalty can be enforced, nor punishment inflicted, for violations of it whilst in force, he expressly proceeds on the ground that no definitive sentence had been pronounced. After final judgment there is no means by which the court can regain possession of the cause, and execution follows as a necessary consequence. If, for instance, the repealing law had intervened between the judgment, or sentence, and the execution, there is no process by which the court could reverse or modify the judgment. The sheriff has no power to inquire into the matter, and he must enforce it; and if it be true that the punishment is saved by the repealing statute, it would involve the absurdity of committing murder in due course of law.

Again, if the prisoner had escaped and the new law had intervened before he was retaken, I can not perceive the policy or the justice of suffering him to elude the punishment of one crime by the perpetration of another; and the escape itself is an offence.

All the difficulty in the case appears to me to have originated in not distinguishing between the judgment and the execution. The court is not now called upon to pronounce judgment. That has already gone forth: and

all that is required of the court is to fix a time when that judgment shall be executed—an act involving the exercise of no judicial power. The prisoner was adjudged to suffer death as a felon on the 11th of June, 1830, and as he has violated the condition on which he was pardoned, he is remitted back to that punishment. All that is required of the court is to fix a time when the sheriff shall execute it; or in other words to require him to do now what ought to have been done then.

In the course of my deliberations on this subject, it occurred to me that it was possible that, under the circumstances, the court would be justifiable in refusing to lend its aid in any manner whatever. But I have not been able to find any authority for it, and on more reflection I am satisfied there is nothing in the idea: for unless there was an authority to discharge, the result would be perpetual imprisonment, a consequence almost as much to be avoided as the other alternative. We are all of opinion, however, that the circumstances furnish a proper case for the executive clemency, and there is little doubt but that it will be extended to the prisoner.

In *Aaron* v. *The State* (40 Alabama, 307), the defendant was tried, convicted of the larceny of two horses, and sentenced to be hanged. Judgment was affirmed on appeal. On the day appointed for the execution of the sentence, military authorities of the United States interfered and prevented the execution of the sentence. Several months thereafter, the prisoner was again brought before the court, which

again sentenced him to death. Between the day first appointed for the execution of the sentence and the second sentence for horse stealing ceased to be a capital offense, the statute had been repealed. The Supreme Court of Alabama held that the resentencing of the prisoner was contrary to law, for the reason that the court in passing the resentence was required by statute to inquire whether any legal reason existed against the passing of sentence, and such a reason did exist, inasmuch as the statute had been repealed.

It is clear from the opinion that the decision would have been the other way if the statute had not required the court to inquire if any legal reason existed against the execution of the first sentence. After admitting that the repeal of a statute after conviction before judgment arrests judgment, the court said, page 309:

> Whilst such is the effect of the repeal of a statute imposing a penalty, after conviction and before sentence, what is the effect if the repealing law intervenes between the judgment or sentence and the execution? In such a case, in the absence of express statutory provision, the execution of the sentence follows as a necessary consequence, because, after an adjournment of the term at which the sentence is pronounced, there is no process by which the court can regain possession of the cause, and arrest or modify the judgment; and the sheriff having no discretion, must carry the sentence into execution. For this reason, the effect of

> a repeal, intervening between the conviction and the sentence, is not the same as when it intervenes between the sentence and the execution. In the latter event, if there be no statutory enactment controlling the question, executive clemency would be the only means of preventing the sentence from being carried into execution.

The court then proceeded to point out that the statute required the lower court "to inquire into the circumstances and if no legal reason existed against it" to resentence the prisoner, and held that the repeal of the earlier statute was a legal reason against resentence.

There is a dissenting opinion by Walker, C. J., who said, page 314:

> Two men may be convicted under the same indictment and by the same verdict, and sentenced to be executed on the same day. If the statute is repealed after the sentence, the sheriff must nevertheless proceed to execute the sentence; but if one of them should escape he must be discharged, while the other will be lawfully executed. The effect of the sentence is made to depend upon the question whether the prisoner escapes. If he does not escape he is rightfully executed under the sentence. If he commits a crime by escaping from the officer, when carried before a judge to be resentenced, he must be discharged. If the prisoner is pardoned, a case is presented for which the law clearly provides; and this pardon, being a legal reason why the sentence

should not be executed, would prevent his execution by the sheriff or his sentence by the court.

It is therefore respectfully submitted that the writ of error should be dismissed.

WILLIAM S. KENYON,
Assistant to the Attorney-General.
EDWIN P. GROSVENOR,
Special Assistant to the Attorney-General.

APPENDIX A.

No. 1757.—An act to prohibit gambling, to repeal article eighteen hundred and one of the civil code and articles three hundred and forty-three and five hundred and seventy-nine of the penal code. (Public Laws enacted by the Philippine Commission, vol. 6, p. 400.)

By authority of the United States, be it enacted by the Philippine Commission that:

SECTION 1. Gambling within the meaning of this act consists in the playing of any game for money or any representative of value or valuable consideration or thing, the result of which game depends wholly or chiefly upon chance or hazard, or the use of any mechanical invention or contrivance to determine by chance the loser or winner of money or of any representative of value or of any valuable consideration or thing.

SEC. 2. A gambling house within the meaning of this act is any building or structure or vessel, or part thereof, in which gambling is frequently carried on, or in which gambling is reputed to be frequently carried on, or to which or in which any person is invited or solicited to gamble.

SEC. 3. Gambling in a public place, or in any building, structure, vessel, or part thereof, to which the public is ordinarily admitted is hereby forbidden, and any person violating this section shall be punished by a fine of not less than ten pesos nor more than five hundred pesos or by imprisonment for not more than one year, or by both such fine and imprisonment, in the discretion of the court. In case of a second conviction both fine and imprisonment shall be imposed.

SEC. 4. Any person having charge or being in the possession or control of any building, structure, vessel, or any part thereof, to which the public is ordinarily admitted, who permits gambling to take place therein shall be punished as provided in the last preceding section.

SEC. 5. Any person having charge or being in the possession or control of any building, structure, or vessel, or any part thereof, who permits any gambling game to take place therein at which game a charge of any kind is made for playing or for the use of the premises or apparatus, or for which game any percentage is taken or collected, and any person having charge or being in the possession or control of any gambling house shall be punished as provided in section three of this act: *Provided, however,* That nothing in this section contained shall be construed to repeal the provisions of Act Numbered Fifteen hundred and thirty-seven or the existing law as to cockpits.

SEC. 6. Any person who shall keep, maintain, or have charge or possession or control of any gambling house, or who shall knowingly permit any property owned by him to be used as a gambling house or who shall have any interest in any gambling house shall be punished as provided in section three of this act. Any person who loses any money or valuable consideration or thing in any gambling house, or his heirs, executors, administrators, or judgment creditors, may, within three years thereafter, recover the same or its value, together with an additional sum equal to the value thereof, in an action in which all persons keeping, maintaining, having charge or control of any gambling game, or per-

mitting, or having any interest or participating therein, shall be jointly and severally liable.

SEC. 7. The playing at and the conducting of any game of monte, jueteng, or any form of lottery or policy or any banking or percentage game, or the use of any mechanical invention or contrivance to determine by chance the winner or loser of money or of any representative of value or of any valuable consideration or thing, is hereby prohibited, and any person taking any part therein or owning or operating any such mechanical invention or contrivance shall be punished as provided in section three hereof. It shall be no defense to any criminal action under this section that the defendant acted as the agent of another or that he had no interest in the result. Any person losing any money or any representative of value or any valuable consideration or thing at any such game or by means of any such mechanical invention or contrivance, or his heirs, executors, administrators, or judgment creditors, may, within three years thereafter, recover the money, consideration, or thing lost or the value thereof in a suit against the banker or the person conducting or owning such game or mechanical invention or contrivance, or against any person having any interest therein or against the person at the time in charge, control, or possession of the premises in which the loss occurred and knowingly permitting such game or the operation of such mechanical invention or contrivance, and all of such persons shall be jointly and severally liable in such action.

SEC. 8. Any person who shall lose any money or any representative of value or any valuable consideration or thing in any gambling house or other place where gambling is prohibited, or his heirs, executors,

administrators, or judgment creditors, may, within three years thereafter, recover the same and an additional amount equal to the value of the loss in an action at law against the owner, tenant, or person in charge, possession, or control of such gambling house or prohibited place and knowingly permitting gambling to be carried on therein or knowingly permitting the operation of any mechanical gambling device or invention therein, and all of such persons shall be jointly and severally liable in such action.

SEC. 9. No wager or other gambling contract shall be enforceable at law, and any promissory note, check, order for the payment of money, I. O. U., *vale*, promise to pay, "chit," or contract or agreement given for money with which to gamble or for money lost at gambling or as a stake shall be void, except as to persons purchasing the same for a valuable consideration in good faith before maturity and not knowing and having no knowledge of facts sufficient to put them upon notice that such promissory note, check, order for the payment of money, I. O. U., *vale*, promise to pay, "chit," or contract or agreement was given in consideration of a gambling debt or for money lost at gambling or as a stake. Any conveyance or transfer of any property, real or personal, valuable thing, chose in action, franchise, or privilege, made for the purpose of gambling or as a stake or to pay gambling losses or debts, shall be void, and the subject of such transfer or its value may, within three years after the actual date of the conveyance or transfer or after the date the transfer took effect, be recovered by suit brought by the grantor or his heirs, executors, administrators, or judgment creditors against the transferee and all persons holding under him or purchasing from him

having knowledge of facts sufficient to put them upon notice as to the nature of the consideration of the original transfer.

SEC. 10. Upon any investigation or proceeding for violation of this act no person shall be excused from giving testimony upon the ground that such testimony would tend to convict him of a crime, but such testimony can not be received against him upon any criminal investigation or proceeding: *Provided, however*, That no person so testifying shall be exempt from prosecution or punishment for perjury committed in the course of any proceeding or investigation had by virtue of this act.

SEC. 11. Any game of cards at which more money is lost by any person engaging in such game than should be lost by a person of his financial condition, taking into consideration all his responsibilities, his honest debts, and the injury done to his family or others dependent upon him for their support, is a gambling game, and all persons engaging in such game shall be punished by a fine of not less than ten pesos nor more than five hundred pesos, and all winners engaging in such game shall be jointly and severally liable to the loser in such game for the amount lost.

SEC. 12. Any peace officer charged with the duty of suppressing gambling who knowingly permits gambling to be conducted within his jurisdiction and who willfully fails to perform his duty shall be punished by a fine of not less than fifty pesos nor more than one thousand pesos, or by imprisonment for not exceeding one year, or by both such fine and imprisonment, in the discretion of the court.

SEC. 13. Article eighteen hundred and one of the Civil Code and articles three hundred and forty-three and five hundred and seventy-nine of the Penal Code,

and all acts and parts of acts inconsistent or in conflict with this act, are hereby repealed.

SEC. 14. The public good requiring the speedy enactment of this bill, the passage of the same is hereby expedited in accordance with section two of "An act prescribing the order of procedure by the commission in the enactment of laws," passed September twenty-sixth, nineteen hundred.

SEC. 15. This act shall take effect on its passage.

Enacted, October 9, 1907.

APPENDIX B.

PROVISIONS FROM THE PENAL CODE OF THE PHILIPPINES.

ART. 21. No crime or misdemeanor shall be punished by a penalty which was not established by law prior to its commission.

ART. 22. Penal laws shall have a retroactive effect in so far as they favor the person guilty of a crime or misdemeanor, even though at the time of the publication of said laws a final sentence should have been pronounced and the convicted person is serving his sentence.

ART. 343. The bankers and proprietors of houses where games of chance, stakes, or hazard are played shall be punished with the penalty of *arresto mayor* and a fine of from 625 to 6,250 pesetas, and in case of a repetition with those of *arresto mayor* in its maximum degree to *prision correccional* in its minimum degree, and a fine double the above mentioned.

The players who assemble at the houses referred to shall be punished with those of *arresto mayor* in its minimum degree and a fine of from 325 to 3,250 pesetas. In case of repetition, with that of arresto mayor in its medium degree and double the fine.

ART. 579. Those who in public places or establishments shall start or take part in any kind of games of hazard not authorized by the police regulations shall incur a fine of from 15 to 70 pesetas.

ART. 1801. (Translation of the Civil Code in force in Cuba, Porto Rico, and the Philippines, p. 232.) A person who loses in a game or a bet which is not prohibited is civilly liable.

Nevertheless, the judicial authority may either not admit the claim when the sum which was wagered in the game or bet is excessive, or may reduce the obligation to the amount it may exceed the customs of a good father of a family.

APPENDIX C.

THE PHILIPPINE BILL OF RIGHTS—COMPILATION OF ACTS OF THE PHILIPPINE COMMISSION, PAGE 23 (32 STAT., 692).

SEC. 5. That no law shall be enacted in said islands which shall deprive any person of life, liberty, or property without due process of law, or deny to any person therein the equal protection of the laws.

That in all criminal prosecutions the accused shall enjoy the right to be heard by himself and counsel, to demand the nature and cause of the accusation against him, to have a speedy and public trial, to meet the witnesses face to face, and to have compulsory process to compel the attendance of witnesses in his behalf.

That no person shall be held to answer for a criminal offense without due process of law; and no person for the same offense shall be twice put in jeopardy of punishment, nor shall be compelled in any criminal case to be a witness against himself.

That all persons shall before conviction be bailable by sufficient sureties, except for capital offenses.

That no law impairing the obligation of contracts shall be enacted.

That no person shall be imprisoned for debt.

That the privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion, insurrection, or invasion the public safety may require it, in either of which events the same may be suspended by the President, or by the governor-general, with the approval of the Philippine Com-

mission, wherever during such period the necessity for such suspension shall exist.

That no ex post facto law or bill of attainder shall be enacted.

That no law granting a title of nobility shall be enacted, and no person holding any office of profit or trust in said islands shall, without the consent of Congress of the United States, accept any present, emolument, office, or title of any kind whatever from any king, queen, prince, or foreign state.

That excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

That the right to be secure against unreasonable searches and seizures shall not be violated.

That neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been unduly convicted, shall exist in said islands.

That no law shall be passed abridging the freedom of speech or of the press, or the right of the people peaceably to assemble and petition the Government for redress of grievances.

That no law shall be made respecting an establishment of religion or prohibiting the free exercise thereof, and that the free exercise and enjoyment of religious profession and worship without discrimination or preference shall forever be allowed.

That no money shall be paid out of the treasury except in pursuance of an appropriation by law.

That the rule of taxation in said islands shall be uniform.

That no private or local bill which may be enacted into law shall embrace more than one subject, and that subject shall be expressed in the title of the bill.

That no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or things to be seized.

That all money collected on any tax levied or assessed for a special purpose shall be treated as a special fund in the Treasury and paid out for such purpose only.

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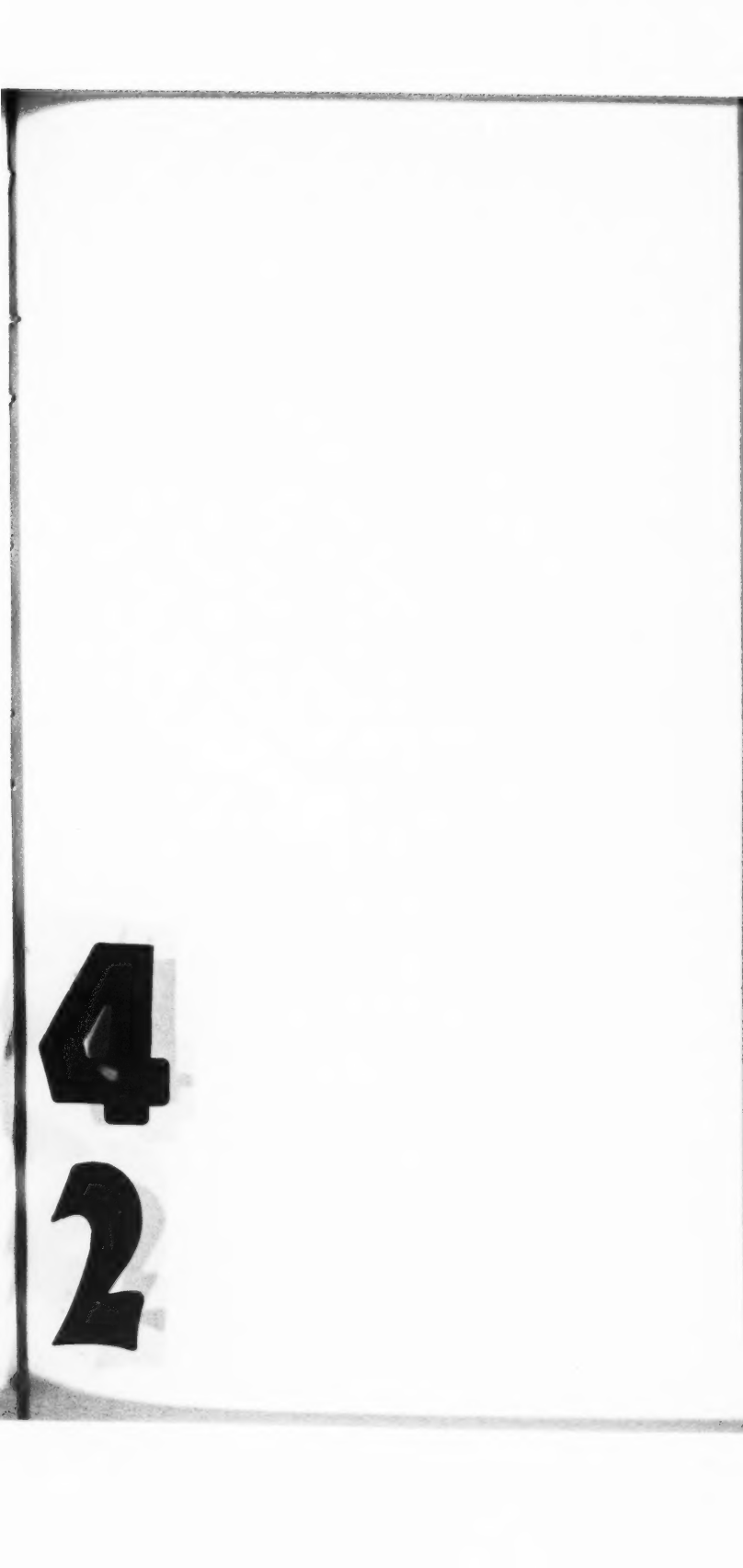
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